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HAROLD B. WILL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 123.

ALFRED H. OSBORNE, *Petitioner,*

vs.

ARVID OWSLEY, SHERIFF OF JACKSON COUNTY, MISSOURI, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI, EN BANC, AND BRIEF IN SUPPORT THEREOF.

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IN THE

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OCTOBER TERM, 1953.

No. .....

ALFRED H. OSBORNE, *Petitioner*,

vs.

ARVID OWSLEY, SHERIFF OF JACKSON COUNTY, MISSOURI, *Respondent*.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Alfred H. Osborne, respectfully files his Petition for Writ of Certiorari, directed to the Supreme Court of Missouri, the highest court of the State, to review the final judgment and decision of the Supreme Court of Missouri, entered January 11, 1954 (Motion for Rehearing duly filed, and overruled on February 8, 1954), one judge dissenting, reversing and quashing the judgment of the Kansas City Court of Appeals entered on December 8, 1952, by which judgment of the Kansas City Court of Appeals, petitioner *in an original Habeas Corpus action had been discharged* from a judgment and commitment of the Circuit Court of Jackson County, Missouri, entered on April 11, 1952, convicting petitioner of constructive criminal con-

tempt of court, and imposing a sentence of 360 days confinement in the county jail and a fine of $1,000, which the judgment of the Supreme Court of Missouri in effect affirmed.

On May 7, 1954, due to delay in the printing of the Transcript of Record Mr. Justice Clark extended the time for filing Petition for Writ of Certiorari to June 8th, 1954.

BASIS OF JURISDICTION.

The judgment of the Supreme Court of Missouri, *en banc*, the highest court in the State, was entered on January 11, 1954, and a motion for rehearing duly filed was denied on February 8, 1954. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (3); Act of June 25, 1948, c. 646; 62 Stat. 929; 28 U. S. C. A. 1257 (3), in that petitioner in said proceeding claimed the constitutional rights and privileges granted to him by Section 1, Amendment XIV, Constitution of the United States, which, without notice, without an opportunity to be heard and present evidence, without discussion and without adjudication have been denied by the Supreme Court of Missouri.

OPINIONS BELOW.

The proceedings in the Circuit Court are not reported.

The judgment of the Kansas City Court of Appeals, discharging petitioner, is reported in *Osborne* v. *Purdome, 254 S. W. 2d 676.* The Ponick case (No. 21,811), referred in said judgment is reported in *Ponick* v. *Purdome, 254 S. W. 2d 673.* Neither case is officially reported.

The opinion of the Supreme Court of Missouri is reported in the Southwestern Advance Sheet, *264 S. W. 2d*

332. It is not yet officially reported. The lawyers, represented as appearing, represented Ponick. Petitioner Osborne was not represented, and did not appear in person in the Supreme Court until he filed his Motion for Rehearing because he had no notice of such proceedings.

SUMMARY STATEMENT OF MATTERS INVOLVED.

On the 28th day of January, 1952, an unverified document called a **"Complaint for Criminal Contempt,"** entitled *State of Missouri ex inf. Henry H. Fox, Jr., Prosecuting Attorney for Jackson County, Missouri, Informant and Complainant,* v. *Alfred H. Osborne, Duke W. Ponick, Will H. Hargus, Nicholas Ivan Callowick, Robert M. Cox, Clarence Hayes, Annetta Lash, Robert W. Lash, Martin Van Bibber and Velma Van Bibber, Contemnors,* and numbered 556,963, was filed in the Circuit Court of Jackson County, Missouri, at Kansas City; said complaint was assigned to Division No. 8, with the Honorable Paul A. Buzard, the judge thereof, presiding, who thereupon issued a rule to show cause why the alleged contemnors should not be adjudged in contempt of court (R. 16-20, incl.).

Lawyers and Laymen Accused of Alleged Criminal Contempt.

This is not a petition to review a judgment in a lawyer disciplinary proceeding, as the argument of the *amici curiae* and the opinion of the Supreme Court of Missouri might lead one to believe. The first three (3) named of the alleged contemnors were lawyers, who represented Ernest H. Smith in a personal injury suit against the Kansas City Public Service Co. The next seven (7) of the alleged contemnors, Nicholas Ivan Callowick, Robert M. Cox, Clarence Hayes, Annetta Lash, Robert W. Lash,

Martin Van Bibber and Velma Van Bibber all were laymen, who as witnesses testified in behalf of Smith in the trial of the personal injury action.

Essence of Charge of Alleged Contempt.

Briefly stated, the essence of the charge of purported criminal contempt by the seven lay witnesses was, without the usual technical requirements of criminal indictments, that said lay witnesses (contemnors) had committed perjury in the damage suit of *Smith* v. *Kansas City Public Service Co.* Again, without the technical embellishments of criminal indictments, the essence of the "Complaint for Criminal Contempt" against the three (3) lawyers, including petitioner herein, was that the lawyars suborned the perjury given by the seven (7) lay witnesses (R. 16-20, incl.).

Neither in the Complaint for Criminal Contempt, nor in the evidence was there the slightest pretense of any contempt, or obstruction of the court by any of the alleged contemnors, either lawyers or laymen, unless it be found in the inherent tendency of perjury to produce a judgment not founded upon the truth, which cannot be distinguished from the obstruction found in innocently given, but false testimony. The trial was had between March 21st and March 24th, inclusive, 1949, without any untoward or disorderly event. This is obvious from the judgment and commitment of the trial court (R. 64-74, incl.). This view is confirmed by Paragraphs one (1) and two (2) of the opinion of the Kansas City Court of Appeals, and made crystal clear in the opinion of the Supreme Court of Missouri, where the court said (Paragraph 2, Page 1, R. 97):

> "After investigation of their professional conduct by members of the bar appointed as *amici curiae* by the judge of the trial court *both lawyers were charged with subornation of perjury for having brought into*

the trial of the Smith case as paid eye-witnesses certain persons whom they knew actually had no personal knowledge of the casualty, and *of fabricating the testimony which those witnesses gave. The prosecuting attorney filed against both lawyers complaints for criminal contempt which charged the foregoing facts.* The circuit court adjudged them guilty, and sentenced Osborne to 360 days in jail and a $1,000 fine, and Ponick to six months in the county jail and imposed a fine of $500."

(Paragraph 2, Page 3, R. 98:)

> "*There is, in our opinion, no basis for the contention that the trial court did not have power to punish the petitioners Ponick and Osborne for contempt for fabricating perjured testimony and injecting it into the trial through suborned witnesses.*"

(Lawyer Hargus had been found not guilty by the trial court. Witness Velma Van Bibber was never served with the rule to show cause, and the case against Martin Van Bibber was dismissed during the trial due to the illness of his attorney.) Lawyers Ponick and petitioner Osborne were found guilty and sentenced as above stated. Lay witnesses Nicholas Ivan Callowick, Robert M. Cox, Clarence Hayes, Annetta Lash, and Robert W. Lash were each found guilty, and were each, just as petitioner Osborne had charged they would be in his Supplemental Petition for Change of Judge, immediately granted a bench parole by the trial judge, the Honorable Paul A. Buzard (Exhibit "B" to Petition for Writ of Habeas Corpus. (R. 20, 41, 72).

On the 10th day of March, 1952, petitioner Osborne and the other alleged contemnors, except Velma Van Bibber, appeared and the trial of said alleged criminal contempt proceeding based upon alleged perjury and alleged subornation of perjury committed in the trial of *Smith*

v. *Kansas City Public Service Co.* in Division 8 of the Circuit Court of Jackson County, Missouri, between March 21st and March 24th, 1949, was begun before the Honorable Paul A. Buzard, Judge thereof.

Questions of the deprival of petitioner's liberty and property without due process of law and denial to petitioner of equal protection of the law under Section 1, of the 14th Amendment of the Constitution of the United States were raised in the trial court by appropriate pretrial motions, which were renewed by post trial motions, objections to extraneous evidence, and objection to the refusal of the trial judge to permit petitioner to prove the lack of jurisdiction of the trial judge because of his complete disqualification. Petitioner filed and presented his petitions and affidavits showing the disqualifications of the Honorable Paul A. Buzard, Circuit Judge (which said Buzard overruled, and refused to permit petitioner to prove), and praying that another Circuit Judge be substituted in his stead (R. 20, 41). Petitioner filed and presented to said Court his Motion to Dismiss the rule to show cause, and therein asserted said complaint was wholly insufficient (R. 37), which motion was denied. Petitioner then filed his separate answer, on oath, denying all matters and things charged in said Complaint as constituting contempt (R. 39). Petitioner then filed his separate motion for judgment on the pleadings, praying to be discharged of and from the charge of contempt (R. 50), all of said motions being overruled by the Honorable Paul A. Buzard, Circuit Judge, without stating any grounds therefor.

Over objection of petitioner, extraneous evidence was received in an effort to establish the truth of the allegations of the Complaint and to disprove and impeach the allegations of said answer.

At the close of the evidence, petitioner filed his separate motion for discharge, which was overruled; he was found guilty and punishment assessed. Motion for new trial was filed and overruled, and judgment entered on the 11th day of April, 1952, as above stated (R. 54, 64).

Habeas Corpus in Kansas City Court of Appeals.

Because, under the decisions of the Supreme Court of Missouri, judgments in constructive criminal contempt proceedings are not subject to review by appeal, or writ of error, but may be reviewed only by the common law Writ of Habeas Corpus, which is limited to jurisdictional matters only, on the 18th day of April, 1952, petitioner filed his separate original Petition for Writ of Habeas Corpus (numbered 21,814) in the Kansas City Court of Appeals, which, under Section 4, Article V, Constitution of Missouri, has original jurisdiction of Habeas Corpus actions, and was by said court admitted to bail pending its judgment and decision.

In said Habeas Corpus petition, Number 21,814, petitioner Osborne presented to the Kansas City Court of Appeals the same questions by him raised in, and overruled by the trial court (R. 6-64, incl.).

On the 11th day of April, 1952, in the same Kansas City Court of Appeals, Duke W. Ponick, alleged contemnor in the same proceeding, and found guilty by the same circuit court judgment, entered on the 11th day of April, 1952, filed his separate Habeas Corpus action (numbered 21,811), wherein said Ponick challenged said judgment upon a single ground, to-wit: that the prosecution of said Complaint for Criminal Contempt was barred by the statute of limitations, embodied in *Section 541.210, Revised Statutes of Missouri, 1949.*

Under the issues as drawn in, and the questions presented by the pleadings, the two separate petitions (*Ponick* v. *Purdome,* No. 21,811, and *Osborne* v. *Purdome*, No. 21,-814) were by no means "companion" cases, and the Kansas City Court of Appeals did not consolidate the two cases for hearing and disposition. But, on December 8, 1952, the Kansas City Court of Appeals, upon the record and without taking evidence in either case, sustained petitioner Ponick's plea of the statute of limitations to the prosecution of the Complaint for Criminal Contempt, and ordered said Ponick discharged in cause No. 21,811.

The plea of the statute of limitations was equally applicable in *Osborne* v. *Purdome*, No. 21,814. Having discharged Ponick upon the ground that prosecution of said Complaint was barred by the statute of limitations, the Kansas City Court of Appeals quite logically discharged petitioner Osborne in cause No. 21,814, on the 8th day of December, 1952. But, such disposition of cause No. 21,814 made it unnecessary for the Kansas City Court of Appeals to pass upon or decide the other and constitutional issues presented by this petitioner in his separate Petition for Writ of Habeas Corpus. As a consequence, the Kansas City Court of Appeals did not accord petitioner Osborne any opportunity to present any evidence upon his claim of being denied his liberty and property without due process of law, and being denied equal protection of the law, in said proceeding, and such constitutional questions were not discussed, considered or ruled upon by the Kansas City Court of Appeals in said proceeding.

On February 2, 1953, the Kansas City Court of Appeals overruled and denied Respondent's Motion for Rehearing or, in the Alternative to Transfer to the Supreme Court (R. 95).

After Discharge and Without Notice.

By *Sections 532.550* and *532.620 Revised Statutes of Missouri, 1949,* (Appendix hereto, pp. 36, 37), and the past decisions of the Supreme Court of Missouri, a judgment of any court having jurisdiction of the parties and of the subject matter, whether it be the Circuit Court, any Court of Appeals, or the Supreme Court, discharging the petitioner upon a Writ of Habeas Corpus, whether correctly or erroneously, is *res adjudicata.*

Nonetheless, after petitioner Osborne was discharged by the Kansas City Court of Appeals on December 8, 1952, the Supreme Court of Missouri, without notice to petitioner, ordered the Kansas City Court of Appeals to transfer the record in both the *Ponick case, supra,* and the *Osborne case, supra,* to said Supreme Court (R. 5) Again, without notice to petitioner Osborne that the Supreme Court had purported to assume jurisdiction of said cause (No. 21,814 in the Kansas City Court of Appeals), without notice that said cause had been docketed in the Supreme Court (wherein it was numbered 43,666), without service of any brief upon petitioner Osborne, without opportunity to file any brief in his own behalf, without notice of any hearing, and without hearing or opportunity to present evidence or argument in support of his claim that he, petitioner Osborne, had been denied his federal constitutional rights in the contempt proceeding, the Supreme Court of Missouri consolidated the two actions, *Ponick* v. *Purdome*, No. 21,811 and *Osborne* v. *Purdome*, No. 21,814, described them as "companion" cases, *re-heard the Ponick case, supra*, completely ignored all issues presented by petitioner Osborne except the single defense of the statute of limitations, which was the only issue raised in the Ponick case, and, on January 11, 1954, reversed and quashed the judgment of the Kansas City Court of Appeals, and thereby, in effect, af-

firmed the judgment of the Circuit Court of Jackson County, Missouri, convicting petitioner Osborne of contempt of court.

In his Motion for Rehearing, petitioner Osborne specifically directed the attention of the Supreme Court of Missouri to the fact that all proceedings in said court were null and void, because they were not authorized by the Constitution of Missouri, were contrary to the statutes of Missouri, in violation of its own rules, and for the want of notice and lack of opportunity to be heard, they denied petitioner his rights under Section 1, Amendment XIV, Constitution of the United States; that, with the Kansas City Court of Appeals having jurisdiction of the parties, jurisdiction of the subject matter, whether this proceeding be reviewed by certiorari, certification, or appeal, the judgment of the Kansas City Court of Appeals was, and is correct, for, upon the pleadings, petitioner Osborne was entitled to be discharged upon his writ of Habeas Corpus, irrespective of the applicability of the statute of limitations.

In his Motion for Rehearing, petitioner further called to the attention of the Supreme Court of Missouri, that said court had overlooked and completely failed to rule in any manner whatsoever upon his claim of a denial of his rights under Section 1, Amendment XIV, Constitution of the United States:

a) by being denied the right to have an impartial judge in said proceedings, under the circumstances in which that right is accorded to all other classes of litigants in Missouri similarly situated, and upon similar applications;

b) by being denied by the trial judge, the right to introduce evidence and prove the utter and complete dis-

qualification of the trial judge as alleged in his Supplemental Petition for Change of Judge;

c) by being deprived of his liberty and property by a judgment upon a complaint that was so vague, so indefinite, and so uncertain as to constitute no charge of contempt;

d) by being deprived of his liberty and property by virtue of judgment and commitment for contempt, where the necessary element of obstruction to the judicial process, other than that incident to perjury, was not established by the evidence, was not found in and by the judgment, or set forth in the commitment (R. 99 to 112, incl.).

SUBSTANTIAL QUESTIONS.

Constructive criminal proceedings are supposed to establish the honor and authority of the court. Instituted, as this one was, more than two years and ten months after the alleged contempt was committed, if it were committed, the record in this case amply demonstrates that such proceedings may, and if the facts alleged in petitioner's Supplemental Petition for Change of Judge were allowed to be proved, did degenerate into a judicially approved one-man mob.

Whatever protection citizens of Missouri are to have from tyrannical and oppressive abuse of the unduly extended contempt power in alleged constructive criminal contempt proceedings, it must be obtained under the Federal Constitution and in the Federal Courts. As developed and administered by the Supreme Court of Missouri, under the loose and meaningless expression of "*sui generis*," the trial court may make its own personal and secret investigation, secretly interview witnesses, appear before

grand juries and secure indictments which have to be and are dismissed for the want of evidence (although on the same evidence the trial judge found guilt beyond a reasonable doubt), appoint his own special prosecutors of which he is chief-of-staff, formulate a state of facts in somewise touching the administration of justice coupled with the conclusion that said facts impede and obstruct the administration of justice, initiate prosecution of ordinary crimes under the designation of Complaint for Criminal Contempt. Under such guise and in such proceedings, the trial court can, and has swept aside all common law, statutory and constitutional safeguards.

In such constructive criminal contempt proceedings, unless protected by the guarantees embodied in Section 1, 14th Amendment of the Constitution of the United States, under the rule of decision of the Supreme Court of Missouri, the people of Missouri are helpless, and cannot even look to their legislature with hope:

a) To secure the right to an impartial judge;

b) To secure a statute of limitations;

c) To secure a right to severance;

d) To secure the right to an appeal;

e) To secure a statute prescribing the minimum and maximum of punishment which may be imposed in such proceedings;

f) To secure the right to a change of venue;

g) To secure the right to a writ of error;

h) To secure the right to prosecution by indictment or information;

i) To secure the right to a jury trial;

j) To prescribe that ordinary and usual rules of evidence shall apply in such proceedings;

for, the alleged inherent contempt power was unalterably frozen by the constitutional provisions creating such courts (in a form and to a degree never claimed by their English sires).

Further, in such proceedings, the alleged contemnors, although summoned to show cause why they may not be adjudged in contempt, may be, as petitioner was, denied the right to prove the complete and utter disqualification of the trial judge by virtue of the facts charged in his Supplemental Petition for Change of Judge (See Appendix hereto, p. 23).

Having been denied the right to prove the lack of jurisdiction of the trial court in the constructive criminal contempt proceeding, petitioner is further denied a hearing upon this issue in two appellate courts.

Having been restored his liberty by the Kansas City Court of Appeals, a court which had jurisdiction of the parties and of the subject matter, under a statute making such judgment a bar to further incarceration, then without notice to petitioner, without hearing, and without an opportunity to present evidence upon his claim of a denial of his rights under the Federal Constitution, to have another court purport to assume jurisdiction and deprive petitioner of his liberty presents the most serious questions in regard to the American concept of due process of law.

QUESTIONS PRESENTED.

In a constructive criminal contempt proceeding, which, in the State of Missouri, is not subject to review by appeal or writ of error (reviewable only by the common law Writ of Habeas Corpus), was petitioner herein denied due proc-

ess of law and the equal protection of the law, as guaranteed by Section 1, Amendment XIV, of the Constitution of the United States:

1) By the Supreme Court of Missouri, without notice of any kind, or at any time, after the Kansas City Court of Appeals under a statute making a discharge on Habeas Corpus a bar to further confinement, had discharged petitioner, quashing the judgment of the Kansas City Court of Appeals and ordering petitioner re-committed?

2) By the overruling and denying of petitioner's petitions and affidavits for a change of judge, and petitioner thus and thereby unreasonably and arbitrarily deprived of the right afforded to all other litigants similarly situated in both civil and criminal proceedings by the laws of Missouri, upon like petitions, motions and affidavits, to obtain a change of judge, where the regular judge of the circuit court is disqualified because of prejudice?

3) By being required to proceed with the trial of said constructive criminal contempt proceeding before a judge, the Honorable Paul A. Buzard, who was, in fact, prejudiced, whose prejudice and disqualification would have been proved as charged in the Supplemental Petition for Change of Judge, if said judge had not refused to permit such proof?

4) By being denied in the trial court the right to prove the lack of jurisdiction of the trial court because the disqualification of the trial judge for the reasons charged in his Supplemental Petition for Change of Judge?

5) By being denied a hearing and opportunity to prove his claim of a denial of his federal right, *i. e.*, an impartial judge to preside in said contempt proceedings, in his Habeas Corpus proceeding in the Kansas City Court of Appeals and in the Supreme Court of Missouri?

6) When deprived of his liberty and property by a judgment and commitment upon a charge not made (contempt), and upon evidence (of perjury and subornation of perjury) that does not sustain the charge attempted to be made (contempt of court)?

7) By being denied the procedural safeguards, to-wit, jury trial or trial upon a verified answer, procedural defenses which concurrently developed with the inherent contempt power allegedly unalterably "frozen" in the courts of record of Missouri, by the constitutional provisions creating said courts, when said procedural safeguards were in specific language likewise "frozen" in every constitution by Missouri, in the very language of the Magna Carta, *i. e.*, "No man shall be deprived of his life, liberty or property but by the judgment of his peers *and* the law of the land."

Reasons Relied Upon for Allowance of the Writ.

The Writ should be issued in this case because the proceedings in, and the decision by the Supreme Court of Missouri, arbitrarily and unreasonably denies petitioner due process of law and equal protection of the law, as guaranteed to him by Section 1, Amendment XIV, of the Constitution of the United States, for the following reasons:

1) Because, by the lack of notice, the Supreme Court of Missouri denied petitioner the first prerequisite of "due process," and thereby all opportunity to present his defense in said court, in what is tantamount to a new proceeding, for the Supreme Court of Missouri could not hear and determine "as on appeal" issues upon which the Kansas City Court of Appeals had not taken evidence, and which the Kansas City Court of Appeals had not purported to adjudicate.

Griffin v. *Griffin*, (App. D. C.) 327 U. S. 220, 66 S. Ct. 556, 90 L. Ed. 635, rehearing denied, 328 U. S. 876, 66 S. Ct. 975, 90 L. Ed. 1645.

Wilson v. *Wilson*, 113 Me. 143, 56 A. 2d 453.
Huger v. *Huger*, 313 Mich. 158, 20 N. W. 2d 848.
Kemohah v. *Shaffer Oil and Refining Co.*, 38 F. 2d 665.

2) Because, when petitioner's motion for an impartial judge was overruled and denied, he was arbitrarily and unreasonably deprived of the right afforded by the laws of the State of Missouri to all other litigants similarly situated in both civil and criminal proceedings, upon like petitions, motions and affidavits, to obtain a change of judge, where the regular judge of the circuit court is disqualified because of prejudice.

State ex rel. v. *Waltner*, 350 Mo. 1021, 169 S. W. 2d 697.
Power Mfg. v. *Saunders*, 274 U. S. 49, 47 S. Ct. 678.
State v. *Irvine*, 335 Mo. 261, 72 S. W. 2d 96.
Skinner v. *State of Oklahoma*, 316 U. S. 535, 62 S. Ct. 1110.

3) Because, the decision of the Supreme Court of Missouri deprives petitioner of his liberty and property without a hearing upon his claim of a denial of his rights under the 14th Amendment, Constitution of United States.

Ragen v. *Young*, 337 U. S. 235, 69 S. Ct. 1073.
International Harvester v. *Missouri*, 234 U. S. 199, 34 S. Ct. 859, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525.

4) Because, the decision of the trial court, which, in effect, the Supreme Court of Missouri has affirmed, decided a Federal question of substance not heretofore determined by this court in a way not in accord with the applicable decisions of this Court.

a) Denial of impartial judge:
Tumey v. *Ohio*, 273 U. S. 510, 47 S. Ct. 437.
Cooke v. *U. S.*, 267 U. S. 517, 45 S. Ct. 390.

b) Denial of right to present evidence in support of defense:

Hovey v. *Elliott,* 167 U. S. 409, 17 S. Ct. 841, 42 L. Ed. 215.

Moore v. *State,* (1928) 118 Oh. St. 487, 161 N. E. 532.

5) Because petitioner is deprived of his liberty and property by virtue of a judgment and commitment finding him guilty of contempt, whereas the complaint does not charge him with contempt, but only with perjury and subornation of perjury, which does not constitute contempt.

Ex parte Creasy, (*en banc*) 243 Mo. 679, 148 S. W. 914.

In re Michael, 326 U. S. 224, 66 S. Ct. 78.

U. S. v. *Goldstein,* 158 F. 2d 916, 920.

Ex parte Hudgings, 249 U. S. 378.

6) Because petitioner is deprived of his liberty and property by virtue of a judgment and commitment finding him guilty of contempt, upon evidence that shows perjury, and subornation of perjury, alone, which does not constitute contempt (See cases under 5).

PRAYER.

For the foregoing reasons your petitioner prays that a Writ of Certiorari issue out of this court to the Supreme Court of Missouri, commanding said court to certify and send to this court, on a day to be designated, a full and complete transcript of the record and of all proceedings in the Court of Appeals had in this cause; that on consideration thereof the judgment of the Supreme Court of

Missouri be reversed and that your petitioner be granted such other and further relief as may be proper.

s) JOHN T. BARKER,
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Kansas City, Missouri,

s) LESTER L. MAY,
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Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Section 1 of Amendment XIV, Constitution of the United States guarantees to petitioner both due process of law and equal protection which includes a fair and impartial judge in all proceedings, including construction criminal contempts.

A. Constitutional and statutory policy of the state of Missouri, is to afford every litigant a fair and impartial judge.

(1) Any circuit judge in this state could, on request, have held court in said Division No. 4.

Article V, Sec. 15, Constitution of Missouri.

State v. *Emerich*, 237 S. W. 2d 169, 172, NOR.

Sections 11.01, 11.02, 11.03, 11.04, of Rules of Supreme Court of Missouri.

(2) Circuit Court of Jackson County, Missouri, is one court composed of ten divisions and ten regular judges.

Section 478.463, Revised Statutes of Missouri, 1949.

State v. *Howard*, 205 S. W. 2d 530, 532.

(3) The proceeding could have been transferred to another division, or any judge of said court could have held court in said Division No. 8 on request of Judge Buzard.

Section 545.650, Revised Statutes of Missouri, 1949.

Section 478.500, Revised Statutes of Missouri, 1949.

(4) The substitution of another judge is not a change of venue.

State ex rel. McAllister v. *Slate*, 278 Mo. 570, 214 S. W. 85, 87.

State ex rel. Renfro v. *Wear*, 129 Mo. 619, 31 S. W. 608.

(5) Due process, as declared by the legislative enactments, entitles all litigants in Missouri to a fair and impartial judge.

A. As to Civil Actions.

Sec. 508.090, Revised Statutes of Missouri, 1949.

Sec. 508.130, Revised Statutes of Missouri, 1949.

State ex rel. K. C. Public Service Co. v. *Waltner*, 350 Mo. 1021, 169 S. W. 2d 697.

B. As to Criminal Prosecution.

Section 546.660, Revised Statutes of Missouri, 1949.

Section 556.010, Revised Statutes of Missouri, 1949.

Section 476.120, Revised Statutes of Missouri, 1949.

State v. *Irvine*, 335 Mo. 261, 72 S. W. 2d 96, 100.

C. Criminal Contempts are "criminal prosecution" within the meaning of Missouri's statutory scheme, embodied in Section 546.660, Revised Statutes of Missouri, 1949, for Section 556.010, R. S. of Mo. 1949, provides:

> "The term 'crime,' 'offense' and 'criminal offense,' when used in this or *any other statute*, shall be construed to mean *any offense*, as well misdemeanor as felony, for which any punishment by imprisonment or fine, may by law be inflicted." (Emphasis ours)

And Section 476.120, R. S. of Mo. 1949, prescribes the penalty of fine and imprisonment for contempt.

Section 476.140, R. S. of Mo. 1949, designates contempt of court as *an offense*.

D. Denial to petitioners, under the circumstances, of the benefits of the statutory method of securing an impartial judge constituted an unreasonable and arbitrary denial of equal protection of the law.

Power Mfg. Co. v. *Saunders*, 274 U. S. 49, 47 S. Ct. 678, 679.

Skinner v. *State of Oklahoma*, 316 U. S. 535, 62 S. Ct. 1110.

II.

A judgment and commitment based upon a charge (contempt) not made, and not sustained by the evidence is a denial of due process under Section 1, Amendment XIV, Constitution of the United States.

A. Complaint charges perjury and subornation, not contempt—

(1) Perjury and subornation of perjury are not contempt—

(a) *In re Michael*, 326 U. S. 224, 227.

(b) *Ex parte Creasy*, 243 Mo. 679, 148 S. W. 914.

(2) Any charge, in complaint, other than perjury and subornation of perjury is so vague, so indefinite and so uncertain that it is tantamount to no charge at all, and a conviction thereon violates due process.

(a) *Thornhill* v. *Alabama*, 310 U. S. 88, 60 S. Ct. 736, l. c. 741.

(b) *De Jonge* v. *Oregon*, 299 U. S. 353, 57 S. Ct. 255, 259, 81 L. Ed. 278.

(c) *Stromberg* v. *California*, 283 U. S. 359, 367, 368, 51 S. Ct. 532, 75 L. Ed. 1117.

B. Evidence shows only perjury and subornation of perjury, not contempt.

(See cases under A.)

Respectfully submitted,

JOHN T. BARKER,
Kansas City Club,
Kansas City, Missouri,

LESTER L. MAY,
First National Bank Building,
Dallas, Texas,

ROBERT DOWNEY,
Donaghey Building,
Little Rock, Arkansas,

Counsel for Petitioner.

APPENDIX.

(Caption Omitted.)

Supplemental Petition of Alfred H. Osborne, for Change of Judge (Which Facts the Trial Judge Refused to Permit Petitioner to Prove.)

Comes now Alfred H. Osborne, accused and alleged contemnor in the above entitled cause, and respectfully shows to the court that:

1. The Honorable Paul A. Buzard, judge of the above named court, is prejudiced against this petitioner.

2. That by reason of said prejudice this petitioner cannot have a fair trial of this cause before said judge.

3. That the said Honorable Paul A. Buzard, judge of said court, will not afford this petitioner a fair trial.

4. That this petition is supported by the affidavit of this petitioner and by the affidavits of two reputable persons, not of kin to or counsel for this petitioner.

5. That said supporting affidavits are appended and attached hereto and by reference made a part hereof.

6. That the within complaint attempts to charge that this accused suborned perjury on the part of Nicholas Ivan Callowick, Robert M. Cox, Clarence Hayes, Annetta Lash, Robert W. Lash, Martin Van Bibber and Velma Van Bibber in the testimony given by each of said persons in the trial of the case of *Ernest Smith* v. *Kansas City Public Service Company*, numbered 510,971.

7. That there is now pending in the Circuit Court of Jackson County, Missouri, at Kansas City, seven indict-

ments, numbered C-24,632, 24,628, 24,630, 24,634, 24,629 and 24,631; that in each of said indictments it is attempted to charge this accused with the crime of subornation of perjury with reference to the testimony allegedly given by each of such named persons in the trial of the case of *Ernest Smith* v. *Kansas City Public Service Company*, number 510,971.

8. That said indictment numbered 24,632 involves the alleged testimony of Nicholas Ivan Callowick in said cause; that said indictment numbered 24,628 involves the alleged testimony of Robert M. Cox in said cause; that said indictment numbered 24,630 involves the alleged testimony of Clarence Hayes in said cause; that said indictment numbered 24,633 involves the alleged testimony of Annetta Lash in said cause; that said indictment numbered 24,634 involves the alleged testimony of Robert W. Lash in said cause; that said indictment numbered 24,629 involves the alleged testimony of Martin Van Bibber in said cause and that said indictment numbered 24,631 involves the alleged testimony of Velma Van Bibber in said cause.

9. That the subject matter of the within complaint and the subject matter of each of said indictments is one and the same; that as to said charges and offenses so attempted to be charged, the said Honorable Paul A. Buzard, judge of this court, is a material witness for the prosecution and his name as such material witness is endorsed upon each and all of said indictments.

10. Alfred H. Osborne further states that he was a licensed attorney in the State of Missouri and enrolled as such upon the record of the Circuit Court of Jackson County, Missouri, from 1936 to December, 1951; that during said period affiant actively engaged in the practice of law, and tried many cases in each of the ten divisions of

the Circuit Court of Jackson County, Missouri, including Division No. 8 thereof in which said division said cause is now pending; that during said period, affiant has tried many cases in said Division No. 8 over which the Honorable Paul A. Buzard, Judge of said division presided; that during more than ten years of said period, affiant has had one of the largest personal injury dockets in Kansas City and Jackson County, Missouri.

11. That the handling of said litigation by affiant has brought the said Honorable Paul A. Buzard, and the affiant into frequent contacts with each other, from which has developed an intensely hostile and very bitter personal hatred between the said Honorable Paul A. Buzard and affiant; that as a result of said Buzard's personal hatred for affiant, said Buzard has for ten years wilfully and maliciously indulged in, and carried on a course of conduct designed to embarrass, to harass, to hinder, to handicap and to destroy and ruin affiant in his personal and professional life, which course of conduct is demonstrated by, but by no means limited to, typical episodes, as follows:

12. That, in 1942, while affiant was rapidly accumulating a large docket, and a large number of cases against the Kansas City Public Service Company, the owner and operator of the public transit system in Kansas City, Kansas, in Kansas City, Missouri, and in Clay and Jackson Counties, Missouri, the Honorable Paul A. Buzard, then judge of Division No. 8 of the Circuit Court of Jackson County, Missouri, arrogated to himself the burden of coming to the office of affiant, and there, the said Honorable Buzard directed in a tirade of personal invective toward affiant, coupled with unsupported charges of unprofessional solicitation of business by affiant and with the threat that the said Buzard would report the affiant to the

Honorable Fred B. Hulse, Chairman of the State Bar Advisory Committee.

13. That, during said period, the Honorable Paul A. Buzard, as Presiding Judge of the Circuit Court of Jackson County, Missouri, or Assignment Judge of said Court and Judge of Division No. 8 of said Court, caused, allowed or permitted Charles L. Carr, General Solicitor of the Kansas City Public Service Company, to assign and concentrate virtually all cases pending against the Kansas City Public Service Company on the docket of a single law firm that had only one trial attorney who already had the largest trial docket in Jackson County, Missouri, and thus, the Honorable Paul A. Buzard, aided, abetted and assisted the Kansas City Public Service Company to invoke the "Engaged Counsel Rule," blocked affiant in his efforts to secure trials for his clients, and in some years the affiant and his clients were thus limited to 5 or 6 trials against the Kansas City Public Service Company even though affiant and his associates then represented more than 300 persons in lawsuits, between one-third and one-half of all suits then pending against the Kansas City Public Service Company, in an effort to financially break this affiant.

14. That, this affiant represented the plaintiff in the case of *Schawanake* v. *Kansas City Public Service Company*, which was tried in Division No. 8 with the Honorable Paul A. Buzard presiding; that, during the trial of said cause, it developed that the doctor who had treated the plaintiff, without notice to and contrary to the expectations of the plaintiff had unexpectedly left town and was not available as a witness for plaintiff; that when, under these circumstances, this affiant attempted to establish by cross examination that said doctor lived next door to an attorney regularly employed by the Kansas City Public

Service Company and left town at the instigation of a claim adjuster for the Kansas City Public Service Company, the said Honorable Paul A. Buzard immediately called a recess and advised this affiant that if affiant proceeded in such cross-examination, that said Buzard would order a transcript of such examination and send it to the State Bar Committee with a request that disbarment proceedings be instituted against affiant, that Charles L. Carr, General Solicitor, was then in the Court room, and under these circumstances affiant was "badgered" into making a compromise settlement in said cause.

15. That, this affiant represented the plaintiff in the case of *Opal Harrell* v. *Kansas City Public Service Company*, which was tried in Division No. 8, with the Honorable Paul A. Buzard presiding; that during the course of said trial, it was shown that this affiant had taken a statement from a witness at the courthouse and during the trial; that, thereupon the Honorable Paul A. Buzard recessed Court, came down off the bench to the counsel table and concluded a volley of personal invective directed to affiant with the statement that if plaintiff secured a verdict, he, the Honorable Paul A. Buzard would set the judgment aside; the Honorable Paul A. Buzard then and there said that affiant should never again take another statement from another witness in the courthouse; that the plaintiff did secure a verdict in said cause which this affiant promptly settled before the said Honorable Paul A. Buzard had an opportunity to carry out his threat to set said judgment aside, all to further irritation of said Honorable Paul A. Buzard.

16. That, during said period, in other cases wherein this affiant has represented plaintiffs, the said Honorable Paul A. Buzard, upon failure of this affiant to answer the calling of the docket, dismissed said cases; that the said

Honorable Paul A. Buzard would then refuse the request of this affiant to set such dismissal aside and reinstate said cause upon the docket of Court; that, thereafter when this affiant would turn such cause over to another lawyer, the Honorable Paul A. Buzard would set aside such dismissal and reinstate said cause upon the docket at the request of the plaintiff's new counsel.

17. That, during this period, the Honorable Paul A. Buzard has arbitrarily and capriciously dismissed lawsuits wherein this affiant represented the plaintiffs for the failure of witnesses to sign their deposition months or even years before said cause could be reached for trial, and in the face of a Missouri Statute that permits depositions to be filed and used although not signed.

18. That, during this period, the Honorable Paul A. Buzard has arbitrarily and capriciously dismissed other lawsuits wherein this affiant represented the plaintiffs for the failure of them to appear for a medical examination upon a certain day, when it was shown such plaintiffs lived a long distance in a foreign state and there had not been sufficient time for them to be notified and to come to Kansas City by the date set by the Court, and that they were willing to come if the court would merely set a new date far enough in advance for them to get to Kansas City on the designated date.

19. That, during said time, the Honorable Paul A. Buzard has on many occasions threatened in indecent, profane and vulgar language to "get" this affiant; that as early as in the spring of 1950, the Honorable Paul A. Buzard was aiding, assisting and counseling and conspiring with certain other Circuit Judges to get this affiant cited for contempt of court; that, in the spring of 1951, after participating for many years in a scheme and plan to block

trials by affiant in an unsuccessful effort to financially break this affiant, the Honorable Paul A. Buzard, in an effort to break down the health of affiant and to impair his efficiency as a trial lawyer, made an agreement with certain other judges of the Circuit Court of Jackson County, Missouri, that this affiant should be forced to go to trial in at least two trials each week; that, since the spring of 1951, the Honorable Paul A. Buzard has gone hither and yon in this county and state, and has in vile, indecent, vulgar and profane language, made remarks derogatory of affiant, and has sought to discourage lawyers from assisting or accepting employment by affiant.

20. That, this affiant represented the defendant in the case of *State* v. *Wanstreet,* wherein a 16 year old girl was charged with the first degree murder of a playmate; that said cause was tried in Division No. 8 of the Circuit Court of Jackson County, Missouri, with the Honorable Paul A. Buzard presiding; that, said cause reeked with taint of third degree police methods; that, said Honorable Paul A. Buzard, being advised in advance, this affiant in the course of his argument would probably point and make reference to the American Flag standing in said courtroom, surreptitiously had the American Flag removed from said court room with the design that when and if affiant attempted to point to the American Flag, affiant and his client would be embarrassed, made to look ridiculous and receive the proverbial "horse laugh," that, in said cause, the Honorable Paul A. Buzard, in his zeal to secure a conviction of affiant's client and in defiance of the defendant's constitutional rights caused the courtroom doors to be locked, and without any warrant or authority of law incorporated, in the instructions to the jury, an instruction that would have permitted the jury to have found the defendant guilty and assessed her punishment

at a term in the Industrial Home for Girls; that, in the course of his argument, this affiant deplored the use of such third degree police methods and being forced to try said cause behind locked doors in the only courtroom in Jackson County, Missouri, in which an American Flag was not displayed; that, the Honorable Paul A. Buzard became so enraged by affiant's argument that he indulged in such an orgy of vile, indecent, profane and vulgar threats against affiant in the presence of a mutual friend said mutual friend called and paid for a taxi to take affiant to the courthouse; that, this affiant then went to the chambers of the Honorable Paul A. Buzard and then to said Honorable Paul A. Buzard extended his apology for any remarks that affiant might have made in said argument that might have in any way cast any reflections upon said Honorable Paul A. Buzard; that said Honorable Paul A. Buzard then refused to accept said apology and refused to shake hands with affiant.

21. That, said Honorable Paul A. Buzard is, in truth and in fact, prejudiced against this affiant accused and will not afford this accused a fair and impartial trial; that said Honorable Paul A. Buzard has personally and privately investigated the matters and things mentioned in the complaint herein, that said Honorable Paul A. Buzard closed down business in Division No. 8 of said court to study the law of contempt to make sure no possible error is committed herein; that said Honorable Paul A. Buzard has personally and privately interviewed witnesses, talked to members of two grand juries, and consulted with other judges and many lawyers with respect hereto, and has in truth and in fact prejudged the issues in said complaint; that, the said Honorable Paul A. Buzard knows that for the past several months a reign of terror has been directed toward this accused and the witnesses named as contem-

nors herein by E. Morgan Woods, Special Agent in charge of the association of Casualty and Surety Executives Claims Bureau of St. Louis, Missouri, the Crime Commission of Kansas City, Missouri, and certain members of the police department of Kansas City, Missouri; that, said Honorable Paul A. Buzard knows that by third degree police methods, said Woods, federal officials and police officers obtained statements from some of the alleged contemnors named in said complaint incriminating themselves, and some of the other alleged contemnors herein; that said Honorable Paul A. Buzard knows that in depositions taken in the instant proceeding or in the criminal cases involving the same identical subject matter, all said alleged contemnors except two have repudiated said statements; that the two alleged contemnors who have failed to repudiate their said statements are so self contradicted, inconsistent, and impeached that their testimony is without probative value, and that all criminal indictments based upon the alleged suborning of perjury by said alleged contemnors by this accused will fail; that upon evidence wholly without probative value, the Honorable Paul A. Buzard will find the accused and all other alleged contemnors herein who fail to testify against this accused, as said Honorable Paul A. Buzard wants, guilty of the alleged contempt attempted to be charged herein, and assess the maximum punishment allowed by law; that, hereafter, said Honorable Paul A. Buzard will place all alleged contemnors found guilty herein upon probation and parole provided they agree to testify against this accused in the above mentioned criminal indictments as said Honorable Paul A. Buzard wants.

Wherefore, petitioner prays this Court to make an order disqualifying the said Judge Buzard herein and to transfer said cause to another division of said Court, or to

notify the Presiding Judge of said Court to request another Circuit Judge to try said cause.

S/ Alfred H. Osborne,
Petitioner.

AFFIDAVIT OF ACCUSED.

State of Missouri, County of Jackson.

Alfred H. Osborne, being first duly sworn, upon his oath, states that the Honorable Paul A. Buzard, Judge of Division No. 8, of the Circuit Court of Jackson County, Missouri, in which court the above entitled cause is pending, will not afford him, this affiant a fair trial of said cause; that the facts alleged in the foregoing petition are true, and that affiant has just cause to believe that he cannot have a fair trial of this cause before the said Honorable Paul A. Buzard because of the matters and things alleged in said petition.

S/ Alfred H. Osborne,
Alfred H. Osborne.

Subscribed and sworn to before me this 10th day of March, 1952.

S/ Irma L. Helm,
(Seal) Notary Public.

My Commission expires July 8, 1955.

FIRST SUPPORTING AFFIDAVIT.

State of Missouri, County of Jackson, ss.

S/ Frank H. Coleman, being first duly sworn, upon his oath, says that he is not of kin to, or counsel for, Alfred H. Osborne, the alleged contemnor in the above entitled cause, and that the Honorable Paul A. Buzard, judge

of the above mentioned court will not afford said Osborne a fair trial.

S/ Frank H. Coleman,
Affiant.

Subscribed and sworn to before me this 10th day of March, 1952.

S/ Irma L. Helm,
(Seal) Notary Public.

My Commission expires July 8, 1955.

SECOND SUPPORTING AFFIDAVIT.

State of Missouri, County of Jackson, ss.

S/ Lucille A. Smith, first being duly sworn, upon her oath, says that she is not kin to, or counsel for, Alfred H. Osborne, the alleged contemnor in the above entitled cause, and the Honorable Paul A. Buzard, judge of the above mentioned court, will not afford said Osborne a fair trial.

S/ Lucille A. Smith,
Affiant.

Subscribed and sworn to before me this 10th day of March, 1952.

S/ Irma L. Helm,
(Seal) Notary Public.

My Commission expires July 8, 1955.

Rules of the Supreme Court.

11.01—Transfers, When Made. Under Section 15 of Article 5 of the Constitution the Supreme Court may temporarily transfer a judge of any appellate or circuit court, with the consent of such judge, to any other appellate or circuit court:

(a) When an appellate court or circuit court requests the transfer of a judge to it; or

(b) When the Supreme Court finds the administration of justice requires such transfer and orders same.

11.02—Powers of Transferred Judges. A judge so transferred, during the period designated shall possess the same powers and be liable to the same responsibilities as a judge of the court to which he is transferred.

11.03—Chief Justice to Receive Copy of Request from Circuit Judge. A circuit judge requesting another circuit judge to sit in his circuit under Section 15 of Article 5 of the Constitution shall send a copy of such request to the Chief Justice of the Supreme Court.

11.04 Court Held With Regular Judge or Separately. Circuit Judges, sitting either by request of the regular judge or by transfer order of the Supreme Court, may hold court in the same county and at the same time either with or separately from the regular judge or judges of the circuit.

Statutes Cited.

Revised Statutes of Missouri, 1949:

Section 476.120. Punishment for contempt.—Punishment for contempt may be by fine or imprisonment in the jail of the county where the court may be sitting, or both in the discretion of the court.

Section 476.140. Commitment for Contempt to Set Forth Particulars.—Whenever any person shall be committed for any contempt specified in this chapter, the particular circumstances of his *offense* shall be set forth in the order or warrant of commitment.

Section 478.463. Circuit Court of Jackson County—Divisions.—The circuit court of the county of Jackson comprising the sixteenth judicial circuit, shall be composed of ten divisions and a judge shall be selected to preside over each division. Divisions numbered one to nine, inclusive, shall sit at the city of Kansas City and the Independence division of said court shall sit at the city of Independence.

Section 478.500. Judge of Other Division to Hold Court, When.—Whenever the judge of any division of said circuit court shall be sick, absent, or, from any cause, is unable to hold any term or part of term of court in such division, or his regular term at Independence, such term, or part of term, may, by request of such judge of such division, be held by a judge of any other division of said circuit court; and if such judge fail to make such request, or if the judge so requested, for any reason, fail to hold such term, or part of term, of court in such division, or his regular term at Independence, then the attorneys of court may, in the manner provided by general law, elect one of their members possessing the necessary qualifications to hold court in such division, or at Independence, for the occasion.

Section 508.090. In What Cases Change of Venue May Be Awarded.—A change of venue may be awarded in any civil suit to any court of record, for any of the following causes:

(1) That the judge is interested or prejudiced, or is related to either party, or has been of counsel in the cause;

(2) That the opposite party has an undue influence over the mind of the judge;

(3) That the inhabitants of the county are prejudiced against the applicant;

(4) That the opposite party has an undue influence over the inhabitants of the county; but in no case shall more than one change be granted either party.

Section 508.130. Change of Venue, Application For, Contents.—Any party, his agent or attorney, may present to the court or judge thereof in vacation, a petition setting forth the cause of his application for a change of venue, and when he obtained his information and knowledge of the existence thereof; and he shall annex thereto an affidavit, made by himself, his agent or attorney, to the truth of the petition, and that affiant has just cause to believe that he cannot have a fair trial on account of the cause alleged; provided that if the removal is asked because of objections to the inhabitants of the county, the application shall not include therein any other county than the one from which the change of venue is asked.

Section 532.550. Person discharged cannot be again imprisoned—Exceptions.—No person who has been discharged by the order of any court or magistrate, upon a Writ of Habeas Corpus issued pursuant to this chapter, shall be again imprisoned, restrained or kept in custody for the same cause; but it shall not be deemed the same cause:

(1) If he shall have been discharged from a commitment on a criminal charge and be afterward committed for the same offense by the legal order or process of the court wherein he shall be bound by recognizance to appear, or in which he shall be indicted or convicted for the same offense;

(2) If, after a discharge for defect of proof, or for any material defect in the commitment in a criminal case, the prisoner may again be arrested on sufficient proof, and committed by legal process for the same offense; or

(3) When the discharge in any case has been ordered on account of the non-observance of any of the forms required by law, and the party is again arrested for imprisonment by legal process, for sufficient cause, and according to the forms required by law.

Section 532.620. Penalty for Recommitting Except As Allowed Herein.—If any magistrate, either solely or as a member of any court, or in the execution of any order, judgment or process, shall knowingly recommit, imprison or restrain of his liberty, or cause to be recommitted, imprisoned or restrained of his liberty, for the same cause, except as in this chapter is prescribed, any person so discharged, or shall knowingly aid or assist therein, he shall be deemed guilty of a misdemeanor, and shall also forfeit to the party aggrieved a sum not exceeding one thousand dollars.

Section 545.650. Change of Venue and Disqualification of Judges in Multiple—Judge Circuits.—In all circuits composed of a single county having more than one judge, no change of venue shall be allowed by said circuit court to the circuit court of any other county in this state for the cause that the judge sitting for the trial of said suit is prejudiced, nor for the cause that the opposite party has undue influence over the judge, but if any such legal objection is made to the judge assigned to try any case, then such case shall be transferred to another division of said circuit court presided over by different judge. Only one such application shall be made by the same party in the same case, and shall be made as to only one of the judges of said court.

Section 545.660. When Judge Deemed Incompetent to Try Case.—When any indictment or criminal prosecution shall be pending in any circuit court or criminal court, the

judge of said court shall be deemed incompetent to hear and try said cause in either of the following cases:

(1) When the judge of the court in which said case is pending is near of kin to the defendant by blood or marriage; or,

(2) When the offense charged is alleged to have been committed against the person or property of such judge, or some person near of kin to him by blood or marriage; or

(3) When the judge is in anywise interested or prejudiced, or shall have been counsel in the cause; or,

(4) When the defendant shall make and file an affidavit, supported by the affidavit of at least two reputable persons, not of kin to or counsel for the defendant, that the judge of the court in which said cause is pending will not afford him a fair trial.

Section 556.010. Criminal Offense Defined.—The terms "*crime*," "*offense*," and "*criminal offense*," when used in this or any other statute, shall be construed to mean any offense, as well as misdemeanor, as felony, for which any punishment by imprisonment or fine, or both, may by law be inflicted.

Section 556.040. Misdemeanor Defined.—The term "*misdemeanor*," as used in this or any other statute, shall be construed as including every offense punishable only by fine or imprisonment in a county jail, or both.

Constitutional Provisions Cited.

Constitution of the United States, Section 1, Article XIV:

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Missouri, 1949:

Section 4, Article V: Superintending Control of Superior over Inferior Courts—Original Remedial Writs: The Supreme Court, Courts of Appeals, and Circuit Courts shall have a general superintending control over all inferior courts and tribunals in their jurisdictions, and may issue and determine original remedial writs.

Section 10, Article V: Transfer of Causes from Courts of Appeals to Supreme Court—Scope of Review.—Cases pending in any court of appeals shall be transferred to the supreme court when any member of the court of appeals or any division thereof dissents from the majority opinion and certifies that he deems said opinion to be contrary to any previous decision of the supreme court or of any of the courts of appeals, and may, after opinion, be transferred to the supreme court by order of either the court of appeals or the supreme court because of the general interest or importance of a question involved in the case, or for the purpose of re-examining the existing law, or pursuant to supreme court rule. The supreme court may finally determine all causes coming to it from any court of appeals, whether by certification, transfer or certiorari, the same as on original appeal.

Section 15, Article V: Judicial Circuits—establishment and changes—authority of judges—general term and divisions.—The state shall be divided into convenient circuits of contiguous counties. In each circuit there shall

be at least one judge. The circuits may be changed or abolished by law as public convenience may require, but no judge shall be removed thereby from office during his term. Any circuit judge may sit in any other circuit at the request of the judge thereof. In circuits composed of a single county and having more than one judge, the court may sit in general terms or in divisions.

FILED
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JUL 17 1954
HAROLD B. WILLEY, Clerk

No. 123.

In the Supreme Court of the United States

October Term, 1954.

ALFRED H. OSBORNE, *Petitioner,*

vs.

ARVID OWSLEY, Sheriff of Jackson County, Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri.

BRIEF FOR RESPONDENT IN OPPOSITION.

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1500 Dierks Building,
Kansas City, Missouri,
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of Jackson County, Missouri,
Jackson County Court House,
Kansas City, Missouri,
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In the Supreme Court of the United States

October Term, 1954.

ALFRED H. OSBORNE, *Petitioner*,

vs.

ARVID OWSLEY, Sheriff of Jackson County, Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri.

BRIEF FOR RESPONDENT IN OPPOSITION.

No. 123.

Questions Presented.

1. Did the Supreme Court of Missouri, in exercising its constitutional superintending control to review the habeas corpus proceedings in the Kansas City Court of Appeals, deny petitioner due process of law because of his alleged lack of knowledge of the review proceedings?

2. Did petitioner waive and abandon any constitutional objections relating to the alleged prejudice of the trial judge by his failure to appear in the Court of Appeals and in the Supreme Court of Missouri?

3. Does the Fourteenth Amendment require the state to provide a jury trial and other procedures applicable to criminal prosecutions in constructive contempt proceedings, or forbid the state from classifying petitioner's conduct as a contempt of court?

STATEMENT.

On November 15, 1951, Judge Paul A. Buzard, Judge of Division 8, Circuit Court of Jackson County, Missouri, appointed three members of the Bar as *Amici Curiae* to investigate information which led that Court to believe that certain contempts of court may have occurred in connection with the cause of *Ernest Smith* v. *Kansas City Public Service Company* (Tr. 66). Even before *Amici Curiae* could complete their investigation and make their report, petitioner Osborne had on November 29, 1951 voluntarily surrendered to the Supreme Court of Missouri his license to practice law. *Osborne* v. *Purdome*, 244 S. W. 2d 1005, 1016 (no official report), cert. den. 343 U. S. 953.

On January 28, 1952, a complaint for criminal contempt was filed against petitioner and other lawyers and laymen, charging them with conspiracy to impede and obstruct the administration of justice in the case of *Ernest Smith* v. *Kansas City Public Service Co.* The complaint alleged in substance that petitioner and other lawyers had induced, hired, coached, and rehearsed the lay contemnors to testify falsely in said case as pretended eyewitnesses to the collision out of which the case arose, although none of the lay contemnors was in fact an eyewitness to the collision and none had any personal knowledge thereof (R. 16-19).

A full hearing and trial of the contempt proceedings at which petitioner appeared *pro se* was held from March 10-14, and March 17-21, 1952, a period of ten days (R. 67). Five of the lay contemnors testified in said trial and in addition to their testimony, other witnesses testified and numerous exhibits were introduced, including a partial transcript of the record in the *Smith* case, which in-

cluded the testimony of all the lay contemnors. The voluntary sworn statement of attorney Ponick, which confessed his guilt of the contempt charges, was received in evidence against Ponick only. At the conclusion of the trial, the court applied the criminal standard of quantum of proof, found that the evidence established beyond reasonable doubt that the petitioner and certain other contemnors were guilty of contempt of court as charged, and sentenced petitioner to 360 days in jail and to pay a fine of $1,000 (R. 64-71). The trial court, being advised that petitioner Osborne intended to file an application for Writ of Habeas Corpus, ordered execution of its judgment delayed for one week, until April 18, 1952, and fixed petitioner's bond at $3,000 (R. 73-74).

On April 18, 1952, petitioner filed his petition for a Writ of Habeas Corpus in the Kansas City Court of Appeals and was immediately admitted to bail (R. 74). No part of the trial of the contempt proceedings was included or referred to in his petition, and the transcript of the proceedings was not included in the record in the habeas corpus proceedings.

The return of the sheriff was filed April 26, 1952 (R. 76), and petitioner's answer to the return was filed June 2, 1952 (R. 78). Neither the petition nor the answer requested the appointment of a commissioner to take testimony on issues of fact. After petitioner filed his answer he took no further steps in the proceedings, and did not appear at any of the hearings in the proceedings either in the Kansas City Court of Appeals or in the Missouri Supreme Court, until January 26, 1954, nineteen months later, at which time petitioner filed a motion for rehearing in the Supreme Court of Missouri. Petitioner did not appear in the Court of Appeals on the date when his case, No. 21,814, was set for oral argument. Petitioner filed no briefs in the Court of Appeals and never re-

quested the appointment of a special commissioner to take testimony therein, in accordance with the well-settled procedure in appellate courts in Missouri.

Co-contemnor Duke W. Ponick did appear, briefed and argued his cause in the Court of Appeals in *Duke W. Ponick* v. *J. A. Purdome, Sheriff,* No. 21,811. The Court of Appeals held that Ponick was entitled to be discharged on the ground that the contempt proceeding was barred by a misdemeanor statute of limitations. 254 S. W. 2d 673. Notwithstanding Osborne's default, the Court of Appeals *sua sponte* held that the *Osborne* case involved the same question as the *Ponick* case, and that Osborne was also entitled to be discharged (R. 3; 254 S. W. 2d 676).

In accordance with the procedure established by Article V, Section 10 of the Missouri Constitution of 1945, and Supreme Court Rule 2.06 (Appendix, p. 31), respondent duly filed in the Kansas City Court of Appeals a motion for rehearing or to transfer the case to the Supreme Court (R. 3). A copy of respondent's motion was personally served on petitioner Osborne, who acknowledged receipt of service by his signature thereon.[1] The Kansas City Court of Appeals overruled respondent's motion (R. 4) and respondent then duly filed in the Supreme Court of Missouri an application to transfer the cause to the Supreme Court (R. 2). Petitioner Osborne was personally served with the notice of respondent's application to transfer and supporting documents on February 26, 1953, but refused to acknowledge service thereof. An affidavit of service was therefore filed in the Supreme Court (Appendix, p. 26). On March 9, 1953, the Supreme Court

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[1]Appendix, p. 25. Inasmuch as petitioner, without the agreement of respondent, has omitted from the printed transcript certain portions of the record, including the proof of service of respondent's motions and applications for transfer (R. 1, 4), and because petitioner urges lack of notice of the proceedings in the Supreme Court, these omissions are supplied in the appendix to this brief.

ordered the cause transferred to the Supreme Court, numbered 43,666, and further ordered that the cause be consolidated with *Duke W. Ponick* v. *Arvid Owsley*, 43,667 (R. 5-6).

The Supreme Court docketed the two consolidated cases for hearing and oral argument on October 1, 1953, and petitioner Osborne was duly notified by the Clerk of the Supreme Court of Missouri of the date of hearing about July 10, 1953, at least eighty days prior to the date of hearing (Appendix, p. 27). Petitioner did not file a brief in the Supreme Court of Missouri, although under Missouri practice (Supreme Court Rule 2.06) he retained his position as the moving or petitioning party. Petitioner Ponick in cause No. 43,667 filed a brief in the Supreme Court, and respondent filed a brief in response to Ponick's brief. Although not required to do so, respondent served two copies of his brief in the *Ponick* case on petitioner Osborne by sending two copies to him at his place of abode, 3600 Genesee Street, Kansas City, Missouri, by registered mail, return receipt requested.[2] The briefs were returned marked "Unclaimed" (Appendix, p. 29).

Although petitioner Osborne had full and ample notice of the date of hearing in the Supreme Court, he failed to appear at the hearing and oral argument in the Supreme Court on October 1, 1953. The Supreme Court of Missouri on January 11, 1954, held that the Writs of Habeas Corpus in the *Osborne* and *Ponick* cases were improvidently issued by the Court of Appeals and ordered said writs quashed (R. 96-98; 264 S. W. 2d 332). The Supreme Court held that criminal contempt proceedings were *sui generis* and that the Missouri misdemeanor statute of limitations did not apply thereto. None of the constitutional questions

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[2]The same address, 3600 Genesee Street, Kansas City, Missouri, is represented as petitioner's present address in documents filed in this Court. See petitioner's notice of filing petition for writ of certiorari.

now asserted by petitioner were raised in or decided by the Supreme Court.

For the first time after petitioner's initial pleadings were filed in the Court of Appeals, petitioner put in his appearance in the Supreme Court of Missouri on January 26, 1954, and filed a motion for rehearing, which the court denied generally on February 8, 1954 (R. 99-112). The Supreme Court of Missouri did not expressly consider petitioner's belated claim of denial of constitutional rights in overruling his motion for rehearing (R. 112).

It is apparent from the record herein that petitioner was in default both in the Court of Appeals and in the Supreme Court and had failed to preserve for decision in those courts the constitutional questions now asserted. When petitioner finally appeared, too late, in the Supreme Court of Missouri on motion for rehearing, he took the position that he was entitled to his discharge on the pleadings (R. 104, 110).

The facts of this case and the questions asserted by petitioner herein are not new or novel to this Court. Petitioner himself has asserted in a previous proceeding for a writ of certiorari in this Court to review habeas corpus and contempt proceedings substantially similar in all respects to the present proceeding that, "Other charges of contempt were filed against the lawyers and they are charged with other offenses yet to be tried; *a decision in this case will determine their guilt or innocence in all of said contempt charges* * * *"[3] Moreover, petitioner also asserted in his Petition for a Writ of Certiorari in this Court's No. 717 that "Since then petitioner Osborne has

[3] *Osborne, et al.* v. *Purdome, Sheriff*, No. 717, facts and opinions reported at 244 S. W. 2d 1005; certiorari denied, May 19, 1952, 343 U. S. 953, 72 S. Ct. 1046; rehearing denied, June 9, 1952, 343 U. S. 988, 72 S. Ct. 1069. The quotation appears on page 5 of petitioner's' Motion for 20 Days Extension of Time within Which to Print Record and File Petition for Writ of Certiorari, filed April 7, 1952.

been adjudged guilty of two other constructive contempts and sentenced to ten months in jail and also 360 days in jail and fined; *that all charges of contempt against him are substantially identical*" (p. 5). It is also highly significant that petitioner's brief in support of his petition for certiorari herein makes the same arguments and cites the same authorities as in the former case.[4] Petitioner thus urged in his former petition that a decision therein would be decisive of the present proceedings, and advanced substantially identical legal arguments in support of both petitions. Petitioner, therefore, has presented no novel or substantial federal question or any question of general importance which would merit review by this Court.

[4]The brief herein (pp. 19-22) is virtually identical, even with respect to typographical errors, with petitioners' supplemental brief in No. 717 (pp. 12-14).

ARGUMENT.

I.

The proceedings in the Supreme Court of Missouri reviewing petitioner's discharge under Writ of Habeas Corpus did not by reason of any lack of notice deny petitioner due process of law. As a matter of law petitioner was not entitled to be served with notice that the Supreme Court had assumed jurisdiction of the case. Moreover, petitioner actually received adequate notice at every step in the proceedings.

a. *No notice was necessary:* The habeas corpus proceedings in the Kansas City Court of Appeals in the present case were transferred to the Supreme Court under and in strict compliance with the procedure established by the Missouri Constitution and Rules of the Supreme Court (Article V, Sections 4, 10, Missouri Constitution of 1945; Supreme Court Rule 2.06). The transfer under this procedure is not an appeal, but is on a basis similar to the transfer of a case from a division of the Supreme Court to the Court *En Banc* (*State* v. *White,* 336 Mo. 83, 248 S. W. 2d 841), and petitioner, who instituted the habeas corpus proceedings in the Court of Appeals, retained the same position as the moving or petitioning party after the case was transferred to the Supreme Court of Missouri (Supreme Court Rule 2.06). The Supreme Court has the power to determine finally all cases transferred to it from any Court of Appeals, the same as on an original appeal, and is not limited to the issues decided by the Court of Appeals (Article V, Section 10, Missouri Constitution of 1945). In view of the nature of the review proceedings here involved, it seems obvious that petitioner, who retained the status of petitioner of complainant at all stages in the proceedings, was not entitled to notice of

the successive steps in the same proceedings, other than, perhaps, the notice that respondent had requested the Supreme Court to transfer the case. No other or additional notice is required by constitution, statute, or rule in Missouri, and petitioner has not attacked the Missouri review procedure itself as denying due process.

As the moving or petitioning party, petitioner had come into court seeking judicial redress, and he was chargeable as a matter of law with notice of all subsequent steps taken in his case, even though he did not in fact appear and had no actual notice thereof.

Pennoyer v. *Neff,* 95 U. S. 714, 734, 24 L. Ed. 565:

"It is hardly necessary to observe, that in all we have said we have had reference to proceedings in courts of first instance, and to their jurisdiction, and not to proceedings in an appellate tribunal to review the action of such courts. The latter may be taken upon such notice, personal or constructive, as the State creating the tribunal may provide. They are considered as rather a continuation of the original litigation than the commencement of a new action."

State ex rel. Anderson Motor Service Co. v. *Public Service Comm.,* 339 Mo. 469, 97 S. W. 2d 116, 119 *(en banc).*

McCormick v. *Stephens,* 141 Mo. App. 236, 124 S. W. 1076.

Brown & Bennett v. *Powers,* 146 Ia. 729, 125 N. W. 833.

Jones v. *Mould,* 151 Ia. 599, 132 N. W. 45.

Smith v. *Apple,* 6 F. 2d 559, 564 (C. C. A. 8).

Cukor v. *Cukor,* 114 Vt. 456, 49 A. 2d 206, 209:

"Due process does not require that personal service shall be made upon a party where the proceeding is only a continuation of litigation which is already within the jurisdiction of the Court."

66 C. J. S., Notice, Section 12, P. 648.

Due process of law does not require that notice be given of proceedings for review such as the proceedings involved in the present case. In *Brown & Bennett* v. *Powers,* 146 Ia. 729, 125 N. W. 833, defendants had originally been discharged in a contempt proceeding against them and the Supreme Court of Iowa on certiorari (a procedure which was not technically an appeal and was somewhat analogous to the transfer procedure in Missouri) annulled the order of the trial court, which thereafter found defendants guilty of contempt. Defendants then initiated certiorari proceedings and claimed that they were not parties to the prior certiorari proceedings, had no notice of such proceedings, were not bound thereby, and that the prior certiorari proceedings deprived them of their rights without due process of law. With respect to this contention the Supreme Court of Iowa held in modifying and affirming the order of the trial court (835):

> "It is sufficient to say that we think no constitutional right of the petitioners is violated either by the statute or by the order of the trial court. The statutory proceedings for the review of the judgment of the lower court are essentially a part of the original proceedings, regardless of the particular form of such proceedings. Being statutory, all parties have notice in advance, and are charged with the burden of ascertaining the status of their case in all its stages. Whether formal notice should be given for the purpose of obtaining a review is a question wholly of legislative discretion. In regular appeals such notice is provided for. But such notice is not essential to the constitutionality of the statute conferring the right of appeal."

The decision in the *Powers* case was followed in *Jones* v. *Mould,* 151 Ia. 599, 132 N. W. 45, in which the Iowa Supreme Court again pointed out that the contemnor had

advance notice of the statutory proceedings available for review of the contempt order and that he was not denied due process even though he was not a nominal party to the certiorari proceedings.

So, in the present case, the transfer proceedings are "statutory" and petitioner Osborne had notice in advance of the procedures provided by Missouri law for review and correction by the Supreme Court of the error of the Court of Appeals. *State ex rel. Anderson Motor Service Co.* v. *Public Service Comm.*, 339 Mo. 469, 97 S. W. 2d 116 (*en banc*), answers all of petitioner's objections concerning lack of notice. Appellants there had been granted a trucking permit after notice and a hearing before the Commission. Pursuant to statute, relator applied to the Circuit Court for review by certiorari of the Commission's order. Appellants were not named as parties in the Circuit Court, were not served with notice of the certiorari proceedings, and concededly had no knowledge of them until after the trial court reversed the Commission's order. The statute gave appellant the right to appear in the review proceedings, but did not provide for notice of the initiation or pendency of the review proceedings. The Supreme Court pointed out that the statute contemplated that interested parties must take notice and keep themselves informed of the subsequent steps provided by the statute, and rejected appellant's contention of denial of due process, holding at 119:

> "Appellants had due notice of all proceedings before the commission and appeared and were heard there. They knew, because the statute informed them, that any party to the proceedings before the commission might demand, and would thereupon be entitled to, a review of the commission's order. They knew the time and manner and the court in which such review might be demanded, and that, on such review, the

> commission's order might be set aside. They had the right, by statute, to appear and to be heard in such review proceeding and to appeal from the judgment of the court. In these circumstances we think the constitutional requirements of due process invoked by appellants were satisfied."

Griffin v. *Griffin,* 327 U. S. 220, 66 S. Ct. 556, and other cases cited by petitioner (Pet. pp. 15-16) all involved *separate* proceedings after judgment in which substantive rights were affected which were not and could not have been in issue in or affected by the original proceedings. The decision of the Supreme Court of Missouri herein was clearly a continuation of the original litigation, and did not affect any rights now asserted by petitioner which he could not have asserted in that Court by properly preserving his constitutional questions.

Petitioner's claim that the judgment of the Court of Appeals was *res judicata* and barred further proceedings ignores the controlling factor that the judgment was not a *final* judgment until the time prescribed for motion for rehearing and application to transfer had expired. See *State* v. *White,* 336 Mo. 83, 248 S. W. 2d 841, 842 (Div. 1, 1952), a criminal case:

> "The finality of the judgment of a court of appeals immediately upon the filing of an opinion, is prevented by Sec. 10, Art. V, which provides for transfer to the Supreme Court by order of the Court of Appeals or of the Supreme Court. Such an order must be made within a reasonable time and that time has been fixed by Supreme Court Rule 2.06 as authorized by the Constitution. Furthermore, it has long been established that an opinion of an appellate court does not become the decision of the court upon which a final judgment can be entered until the disposition of a pending motion for rehearing * * * (Citing cases). The provisions of Article V of the 1945

Constitution establish an integrated system of appellate courts so that transfer of a case from a court of appeals is on a basis similar to a transfer from a Division of the Supreme Court to the Court *en banc.* See Sec. 9, Art. V."

b. *Petitioner had adequate notice:* Although petitioner was not entitled to any notice, except perhaps notice of the original application of respondent to transfer the proceeding to the Supreme Court, the record herein shows that petitioner had abundantly adequate notice of all proceedings both in the Court of Appeals and in the Supreme Court of Missouri.

1. Petitioner was personally served with respondent's motion for rehearing or, in the alternative, to transfer to the Supreme Court, which was filed in the Kansas City Court of Appeals on December 23, 1952, and petitioner signed an acknowledgment of receipt thereof (Appendix, p. 24; Tr. 3-4).

2. Respondent's application for transfer to the Supreme Court and notice thereof, together with supporting documents, were filed in the Supreme Court of Missouri on March 3, 1953, after having been personally served on petitioner in his cell at the Jackson County jail on February 26, 1953. Petitioner refused to acknowledge receipt of these documents, so an Affidavit of Service was prepared and filed in the Supreme Court (Appendix, p. 26; Tr. 1).

3. There is no Missouri statute or rule requiring that the Supreme Court notify petitioner of its order transferring his case to the Supreme Court. Supreme Court Rule 1.07, however, provides in part that, "The parties shall be notified by the Clerk of the Appellate Court of the date of the hearing at least thirty days before the date on which the appellant's brief is required to be served."

The Clerk of the Supreme Court of Missouri customarily notifies the attorneys or parties of record in cases pending before the Supreme Court of the date of hearing at least eighty days prior to that date by mailing them a copy of the printed docket of the Supreme Court. This customary procedure was followed in the present case, and the Deputy Clerk of the Supreme Court notified petitioner Osborne about July 10, 1953, that his case, No. 43,666, was set for hearing on October 1, 1953, by mailing a copy of the Supreme Court docket to his home address, postage prepaid (Appendix, p. 27).

4. At no time after the initial pleadings were filed in the Court of Appeals did petitioner appear either in that Court or in the Supreme Court, and he filed no briefs in either court. Respondent was not therefore called upon to file a responsive brief in his case. Briefs were filed in the Supreme Court by both parties in the companion case of *Duke W. Powick* v. *Arvid Owsley*, No. 43,667, and respondent as a courtesy to petitioner mailed two copies of respondent's brief in the *Powick* case to petitioner's regular and present place of abode, 3000 Genesee Street, Kansas City, Missouri, by registered mail. However, the envelope containing the brief was returned marked "Unclaimed" (Appendix, p. 29).

It is apparent, therefore, that respondent and the Supreme Court complied to the letter with the statutory procedure in the proceedings transferring this case to the Supreme Court, and that petitioner had adequate notice of every step in the proceedings, but deliberately chose not to appear in the Court of Appeals or in the Supreme Court, apparently in the hope that by burying his head in the sand he could create a constitutional question.

II.

Petitioner's claim of prejudice is baseless, but even if it be assumed *arguendo* that the claim has any merit, petitioner has failed to preserve and has abandoned it. After the initial pleadings in the Court of Appeals, petitioner did absolutely nothing until he filed his motion for rehearing in the Supreme Court over a year and a half later. He did not appear on the date set for oral argument in the Court of Appeals, he filed no briefs in the Court of Appeals, he at no time appeared in either the Court of Appeals or the Supreme Court nor did he at any time request the appointment of a special commissioner to hear testimony, and he filed no brief in the Supreme Court until after its decision quashing the Writ of Habeas Corpus. Petitioner has therefore as a matter of law waived and abandoned all contentions relating to prejudice of the trial court, and to petitioner's being denied due process or equal protection thereby. Even in a criminal prosecution, the right to disqualify a judge may be waived. *State* v. *Perkins*, 339 Mo. 27, 95 S. W. 2d 75, 77 (*en banc*).

Under Missouri procedure in habeas corpus proceedings such as this one in appellate courts, unless the petitioner requests the appointment of a commissioner to take testimony on issues of fact at the date set for hearing, he waives that right. In that event the *allegations of the petition may be considered only so far as they are sustained by the judgment and commitment. Ex parte Clark*, 336 Mo. 121, 106 S. W. 980 (*en banc*) was an original habeas corpus proceeding in the Supreme Court to review the commitment of an attorney for criminal contempt. Petitioner's reply to the Sheriff's return requested the appointment of a commissioner to take testimony on controverted fact issues, but petitioner's counsel appeared at the hearing and submitted the cause on brief and oral

argument. In neither did petitioner press the request for the appointment of a commissioner, and the court also pointed out that, by implication, the cause was submitted on the theory that only questions of law were involved. The Supreme Court held (p. 995):

> *"Petitioner, by waiving an order for the appointment of a commissioner to take testimony to establish such facts, if any, thereby elected to go on without them, i.e., he elected to stand on the record facts, if stand he can at all. Having made that election, he must abide it."* (Emphasis supplied.)

The Court further held that they would consider the case on the theory that the allegations of the petition were taken as true, *"only so far as sustained by the recitals in the judgment and the commitment"* (p. 996). (Emphasis supplied.)

Here, petitioner did not even appear in either appellate court, and thereby chose to stand on the record facts alone. The trial court considered and overruled all petitioner's petitions and motions raising the question of prejudice in fact of the trial judge (R. 67), and therefore none of the allegations of the petition for habeas corpus and exhibits thereto which relate to prejudice are "sustained by the recitals in the judgment and order of commitment." None of the constitutional or other questions now asserted by petitioner were properly before the Supreme Court of Missouri for decision, nor will they support the jurisdiction of this Court.

It is well settled that constitutional questions must not only be timely raised but must also be preserved throughout the state court proceedings in accordance with state procedure, in order for a federal constitutional question to be properly before the Supreme Court for decision. *See Parker* v. *Illinois*, 333 U. S. 571, 68 S. Ct. 708; *Bailey* v.

Anderson, 326 U. S. 203, 206-7; 66 Sup. Ct. 66; *CIO* v. *McAdory*, 325 U. S. 472, 477, 65 S. Ct. 1395; *Harding* v. *Illinois*, 196 U. S. 78, 84, 25 S. Ct. 176 (Failure to cite authorities or advance argument in support of constitutional objection as required by state practice.) Petitioner could have preserved his claims based on the Federal Constitution by briefs, argument, and a request for a hearing of evidence either in the Court of Appeals or in the Supreme Court, but chose to default in both courts. It is well-settled in Missouri that failure to brief and argue questions which have been raised below, even constitutional questions, constitutes an abandonment of such questions in the Court of Appeals or in the Supreme Court.

Tureman v. *Altman*, 361 Mo. 1220, 239 S. W. 2d, 304, 308 (*en banc*).
Merrick v. *Bridgeways, Inc.*, 362 Mo. 476, 241 S. W. 2d 1015, 1019 (Div. 1).
Jones v. *Giannola*, 252 S. W. 2d 660, 663 (St. Louis App.) (No official report).
Baker v. *Atkins*, 258 S. W. 2d 16, 22 (K. C. App.) (No official report).

It was too late for petitioner to attempt to revive his claimed constitutional questions by argument in his motion for rehearing in the Missouri Supreme Court inasmuch as that Court overruled the motion generally without explicitly determining the constitutional questions.

Consolidated Turnpike Co. v. *Norfolk & Ocean View Ry. Co.*, 228 U. S. 326, 334, 33 S. Ct. 510.
Radio Station WOW v. *Johnson*, 326 U. S. 120, 128, 65 S. Ct. 1475.
Mergenthaler Linotype Co. v. *Davis*, 251 U. S. 256, 258, 40 S. Ct. 133.
Weatherford v. *Spiritual Christian Union Church*, 163 S. W. 2d 916, 919 (Div. 2) (No official report).
Flint v. *Loew's St. Louis Realty & Amusement Corp.*, 344 Mo. 310, 126 S. W. 2d 193 (Div. 2).

This Court has held that a judge should not be driven from the bench by such aggravated personal attacks on the judge by a contemnor as occurred in this case, which are made in order to drive the judge out of the case for ulterior reasons. *Cooke* v. *United States,* 267 U. S. 517, 539, 45 S. Ct. 390.[5] The contempts charged did not involve personal criticism or disrespect of the trial court, which would disqualify the judge under Rule 35.01 (Appendix, p. 33) of the Rules of Criminal Procedure of Missouri. The Supreme Court of Missouri, in review of contempt proceedings against this petitioner, has twice held that the Missouri statutes providing for the right to change of venue in civil and criminal cases on filing of affidavits of prejudice of the trial judge do not apply to criminal contempt proceedings, and under Missouri law petitioner was not entitled as a matter of law to a change of judge herein. *Osborne* v. *Purdome,* 244 S. W. 2d 1005, 1013, cert. den. 343 U. S. 953; *Osborne* v. *Purdome,* 250 S. W. 2d 159, 160-61 (No official report). The Missouri Supreme Court also held in the foregoing cases that the denial of a change of judge did not deprive petitioner of due process of law. It is clearly not a denial of procedural due process for the judge to hear and decide the constructive contempt proceedings that arose in his court. See *Higgins* v. *United States,* 160 F. 2d 223 (App. D. C.), cert. den. 331 U. S. 840.

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[5]Prejudice of the trial judge seems a routine assertion of Petitioner in these contempt proceedings, regardless of the judge involved. See *Osborne* v. *Purdome,* 250 S. W. 2d 159, and *Osborne* v. *Purdome,* 244 S. W. 2d 1005, cert. den. 343 U. S. 953 (which involved almost identical charges) in which the Supreme Court rejected claims of prejudice made against two other Jackson County, Missouri, Circuit Judges as being without factual support in the record of the contempt proceedings.

III.

Petitioner's other contentions involve no federal questions and may be disposed of summarily. With reference to the claim that no contempt was alleged or proved, the Missouri Supreme Court *en banc* in *Osborne* v. *Purdome,* 244 S. W. 2d 1005, 1014, on substantially identical facts and charges held to the contrary. See also the decision below, 264 S. W. 2d 332. So long as a state does not lay hold of *innocent conduct* as an arbitrary pretense for arbitrary punishment as contempt, "What constitutes contempt, as well as the time during which it may be committed, is a matter of local law." *Patterson* v. *Colorado,* 205 U. S. 454, 461, 27 S. Ct. 556.

To the same effect is *Skinner* v. *Oklahoma,* 316 U. S. 535, 540, 62 S. Ct. 1110: "Thus, if we had here only a question as to a State's classification of crimes, such as embezzlement or larceny, no substantial federal question would be raised."

Due process of law and equal protection of the laws do not necessitate that persons charged with criminal contempt be given a jury trial and other procedural safeguards applicable to criminal prosecutions. *Eilenbecker* v. *District Court of Plymouth County, Iowa,* 134 U. S. 31, 10 S. Ct. 424; *Myers* v. *United States,* 264 U. S. 95, 104-105, 44 S. Ct. 272; *United States* v. *United Mine Workers of America,* 330 U. S. 258, 298, 72 S. Ct. 925. Due process does not require a trial by jury even in a state criminal prosecution. *Jordan* v. *Massachusetts,* 225 U. S. 167, 32 S. Ct. 651.

IV.

This case does not involve any question of substance or of general importance. Petitioner has heretofore presented to this Court the same questions in a case which pe-

titioner himself contended involved "substantially identical" charges, and in which he represented to this Court that the decision therein would determine his guilt or innocence in other contempt charges including the present one.[6] In the previous Osborne petition in this Court, he raised questions concerning (1) his constitutional right to a change of judge based on his allegations of prejudice, (2) his right to trial by jury, and (3) whether the charged conduct could constitute contempt of court, all of which he also relies upon in his present petition.

The Fourteenth Amendment to the Constitution of the United States does not straitjacket a state in classifying as contempt nefarious conduct striking at the very heart of the administration of justice such as is here involved or in providing procedures to deal with such conduct, but requires simply that persons charged with indirect criminal contempt be given reasonable notice and a fair hearing. The record in this case established that petitioner had adequate notice at every stage in the proceedings and had a full and fair hearing—that his constitutional rights were fully protected in the contempt and habeas corpus proceedings.

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[6] *Osborne* v. *Purdome*, 244 S. W. 2d 1005, cert. den. 343 U. S. 953, rehearing den. 343 U. S. 988.

Conclusion.

The judgment below was correct and all procedures applicable to contempt and habeas corpus proceedings were carefully observed. Petitioner has neither preserved nor presented to this Court any federal question, or any question of substance or general importance. We therefore respectfully submit that the petition for writ of certiorari should be denied.

CARL E. ENGGAS,
1500 Dierks Building,
Kansas City, Missouri,
JAMES A. MOORE,
1007 Bryant Building,
Kansas City, Missouri,
DAVID M. PROCTOR, JR.,
1016 Baltimore,
Kansas City, Missouri,
Amici Curiae.

RICHARD K. PHELPS, Prosecuting Attorney
of Jackson County, Missouri,
Jackson County Court House,
Kansas City, Missouri,
Of Counsel.

Appendix.

(Filed Mar. 18, 1953, Marion Spicer, Clerk, Supreme Court)

(Caption omitted)

(Filed Dec. 23, 1952, Renick Jones, Clerk, Kansas City Court of Appeals.)

Respondent's Motion for Rehearing or, in the Alternative, to Transfer to the Supreme Court.

Comes now respondent and respectfully moves the Court to grant a rehearing in this cause or, in the alternative, to transfer this cause to the Supreme Court of Missouri upon the following grounds:

1. Respondent has this day filed a Motion for Rehearing or to Transfer to the Supreme Court together with Suggestions in Support of the Motion in *Ex Parte Duke W. Ponick* v. *J. A. Purdome,* No. 21,811. This cause involves the exact question presented in *Ex Parte Duke W. Ponick* v. *J. A. Purdome,* No. 21,811.

2. Respondent, therefore, to avoid duplication, respectfully requests the Court to consider the Motion and Supporting Suggestions which are filed in *Ex Parte Duke W. Ponick* v. *J. A. Purdome,* No. 21,811, as Respondent's Motion and Supporting Suggestions in this cause as though filed herein.

Respectfully submitted,

(Signed) CARL E. ENGGAS
CARL E. ENGGAS

(Signed) JAMES A. MOORE
JAMES A. MOORE

(Signed) DAVID M. PROCTOR, JR.
David M. Proctor, Jr.,
Amici Curiae.

(Signed) HENRY H. FOX, JR.
HENRY H. FOX, JR.,
Of Counsel.

Received a copy of the above Motion and of Respondent's Motion and Suggestions in Support thereof filed in Ex Parte Duke W. Ponick v. J. A. Purdome, No. 21,811, this 23 day of December, 1953.

(Signed) ALFRED H. OSBORNE.
ALFRED H. OSBORNE.

STATE OF MISSOURI—Set.

I, Marion Spicer, Clerk of the Supreme Court of the State of Missouri, hereby certify the above and foregoing to be a full, true and correct copy of Respondent's Motion for Rehearing or, in the alternative, to Transfer to the Supreme Court, in a cause entitled Ex Parte Alfred H. Osborne, petitioner, vs. J. A. Purdome, Sheriff of Jackson County, Missouri, respondent, No. 43,666, as fully and completely as the same appears of record and on file in my office.

In Testimony Whereof I hereunto set my hand and affix the seal of said Supreme Court at my office in the City of Jefferson, State aforesaid, this 3rd day of July, 1954.

(Signed) MARION SPICER,
Clerk of Supreme Court of
State of Missouri.

(Filed Mar. 3, 1953, Marion Spicer, Clerk, Supreme Court)
(Caption omitted)

Notice of Application of Respondent, Arvid Owsley, for Transfer to the Supreme Court.

To Alfred H. Osborne and to Renick Jones, Clerk of the Kansas City Court of Appeals:

You, and each of you, are hereby notified that Respondent in Cause No. 21,814, habeas corpus, in the Kan-

sas City Court of Appeals, entitled Ex Parte Alfred H. Osborne, Petitioner, vs. Arvid Owsley, Sheriff, Respondent, will file in the Supreme Court of Missouri Application for Transfer of this cause to the Supreme Court of Missouri on March 4, 1953. A copy of said Application, including supporting suggestions, and a true copy of the opinion of said Court of Appeals and of respondent's motion for rehearing or to transfer to said Court, and the ruling thereon, is delivered to you herewith.

(Signed) CARL E. ENGGAS
CARL E. ENGGAS

(Signed) JAMES A. MOORE
JAMES A. MOORE

(Signed) DAVID M. PROCTOR, JR.
David M. Proctor, Jr.,
Amicus Curiae.

(Signed) RICHARD K. PHELPS
RICHARD K. PHELPS
Counsel.

The undersigned hereby acknowledge receipt of the above notice and of copies of the application for transfer and supporting documents above mentioned, this 26 day of February, 1953.

(Signed) RENICK JONES,
Clerk of the Kansas City
Court of Appeals.

ALFRED H. OSBORNE.

(Filed Mar. 3, 1953, Marion Spicer, Clerk, Supreme Court)
(Caption omitted)

Affidavit of Service.

STATE OF MISSOURI, }
COUNTY OF JACKSON, } ss.

MELVIN J. SPENCER, being duly sworn, deposes and says that he served a copy of the foregoing Notice, together with copies of the application for transfer to the Supreme Court of Missouri and supporting documents mentioned in said Notice by delivering copies thereof to Alfred H. Osborne in his cell at the Jackson County Jail at Kansas City, Missouri, on the 26th day of February, 1953.

(Signed) MELVIN J. SPENCER.

Subscribed and sworn to before me this 27th day of February, 1953.

(SEAL) (Signed) ROSEMARY F. NUGENT,
Notary Public.

My Commission Expires: Nov. 30, 1955.

STATE OF MISSOURI—Set.

I, Marion Spicer, Clerk of the Supreme Court of the State of Missouri, hereby certify the above and foregoing to be a full, true and correct copy of the Notice of Application of Respondent, Arvid Owsley, for Transfer to the Supreme Court, and Affidavit of Service, in a cause entitled Ex Parte Alfred H. Osborne, petitioner, vs. Arvid Owsley, Sheriff of Jackson County, Missouri, respondent,

No. 43,666, as fully and completely as the same appear of record and on file in my office.

IN TESTIMONY WHEREOF I hereunto set my hand and affix the seal of said Supreme Court at my office in the City of Jefferson, State aforesaid, this 3rd day of July, 1954.

(Signed) MARION SPICER,
Clerk of Supreme Court of
State of Missouri.

(Caption omitted)

Affidavit.

STATE OF MISSOURI,
COUNTY OF COLE, } ss.

Helen Green, of lawful age, being first duly sworn upon her oath, states as follows:

1. She is and at all times during the year 1953 was a Deputy Clerk of the Supreme Court of the State of Missouri.

2. It is a part of the customary procedure of the office of the Clerk of the Supreme Court of the State of Missouri, and a part of her regular duties, to notify the attorneys of record, or if none, the parties of record, in all cases pending in the Supreme Court of Missouri, of the date of the hearing of such cases at least eighty (80) days before the date of hearing, by mailing to them a copy of the printed docket of the Supreme Court.

3. On or about July 10, 1953, and at least eighty (80) days prior to October 1, 1953, she notified Petitioner Alfred H. Osborne that the date of the hearing in the case of *Alfred H. Osborne, Petitioner,* v. *Arvid Owsley, Sheriff of Jackson County, Missouri, Respondent,* No.

43,666, would be October 1, 1953, by depositing a printed copy of the docket of the Supreme Court of Missouri, en banc, September Session, 1953, in the United States mail postage prepaid, in a sealed envelope addressed to Alfred H. Osborne, 3600 Genesee, Kansas City, Missouri; and that said case No. 43,666 was listed on Page 2 of said printed docket for hearing on October 1, 1953.

4. That the return address of the Clerk of the Supreme Court, Jefferson City, Missouri, was plainly printed in the upper left hand corner of said envelope, and that said envelope was not returned to the office of the Clerk of the Supreme Court of Missouri.

(Signed) Helen Green

Subscribed in my presence and sworn to before me this 3rd day of July, 1954.

(Signed) Marion Spicer,
Clerk of the Supreme Court of Missouri.

Certificate.

I hereby certify that Helen Green is now and continuously during the year 1953 was a Deputy Clerk of the Supreme Court of Missouri.

Dated: July 3, 1954.

Marion Spicer, Clerk of the Supreme Court of Missouri.

State of Missouri—Set.

I, Marion Spicer, Clerk of the Supreme Court of the State of Missouri, hereby certify the above and foregoing to be a full, true and correct copy of Affidavit of Helen Green filed July 3, 1954, in a cause entitled Alfred H.

Osborne, petitioner, vs. *Arvid Owsley, Sheriff of Jackson County, Missouri*, respondent, No. 41,686, as fully and completely as the same remains of record and on file in my office.

Witness my hand and seal of said Supreme Court of Missouri, this 3rd day of July, 1954.

(Signed) Ruben Steers,
Clerk of the Supreme Court of Missouri.

(Caption omitted)

Affidavit.

State of Missouri, } ss.
County of Jackson, }

Carl E. Enggas, of lawful age, being first duly sworn upon his oath, states that he is one of the Assistant Counsel and counsel for Respondent in the above captioned case; that on or about September 10, 1953, he served on Petitioner Alfred H. Osborne, two copies of the Brief of Respondent in the Supreme Court of Missouri, September Session, 1953, in the case of *Dale W. Pemick, Petitioner, v. Arvid W. Owsley, Sheriff of Jackson County, Respondent*, No. 41,687, by placing each copies in a sealed envelope addressed to Petitioner Alfred H. Osborne at his regular and present place of abode, 3939 Genesee, Kansas City, Missouri, and by depositing each envelope in the United States mail, postage prepaid, to be sent by registered mail, return receipt requested; that said envelope was returned to the sender during the month of October, 1953, with the following notation thereon: "Unclaimed October 1, 1953"; that said envelope is presently in the possession of Affiant, and Affiant will produce or

forward the same to the Court for inspection upon t
request of the Court.

(Signed) Carl. E. Engg
Carl E. Engg

Subscribed and sworn to before me this 2nd day
July, 1954.

(Signed) Rosemary F. Nugent,
Notary Public in and for sa
County and State.

My Commission expires: Nov. 30, 1955.

State of Missouri—Set.

I, Marion Spicer, Clerk of the Supreme Court of t
State of Missouri, hereby certify the above and foregoi
to be a full, true and correct copy of the Affidavit
Carl E. Enggas, filed July 3, 1954, in a cause entitl
Alfred H. Osborne, petitioner, vs. Arvid Owsley, Sheri
of Jackson County, Missouri, respondent, No. 43,666,
fully and completely as the same remains of record a
on file in my office.

Witness my hand and seal of said Supreme Court
Missouri, this 3rd day of July, 1954.

(Signed) Marion Spicer,
Clerk of Supreme Court
Missouri.

Constitutional Provisions and Rules Cited

Article V, Secs. 4 and 10, Missouri Constitution of 1945; See petitioner's brief, p. 39.

Rule 2.06, Rules of the Supreme Court of Missouri; 2 R. S. Mo. (1949), 4105:

Transfers from Courts of Appeals. No case shall be transferred by order of the Supreme Court from a Court of Appeals unless a motion for rehearing has been filed and overruled in the Court of Appeals and unless a motion for such transfer has been made to the Court of Appeals within the time for filing a motion for rehearing and denied by it, and unless an application for transfer is filed in the Supreme Court within thirty days after the denial of the motion for rehearing and motion for transfer by the Court of Appeals. The motion for transfer filed in the Court of Appeals may be joined with a motion for rehearing and a rehearing or transfer may be prayed for in the alternative. At least five days' notice of such application shall be given to all parties adversely affected, or their attorneys, and to the clerk of the Court of Appeals.

The application may be printed or typewritten and shall not exceed six pages. It shall set out concisely the question of general interest or importance involved in the case, or why re-examination of the existing law is required, or wherein the Court of Appeals has failed or refused to follow the last controlling decision of the Supreme Court, concisely setting out the issue presented to the Court of Appeals and showing wherein and in what manner the alleged conflicting ruling arose and stating the citation of the controlling decision. The application may allege more than one ground either concurrently or in the alternative. No application will be granted unless it shows that a question of general interest and importance is

presented which has not previously been decided by the Supreme Court, or shows reasonable grounds for holding the existing law to be erroneous, or shows that the Court of Appeals has failed or refused to follow the last controlling decision of the Supreme Court. The application shall be accompanied by a true copy of the opinion of the Court of Appeals in said cause, and copies of the motion for rehearing and the motion for transfer in the Court of Appeals and the rulings thereon.

Suggestions in support of the application, not to exceed six pages, may be filed.

The notice may be printed or typewritten, and shall be accompanied by a true copy of the application and all exhibits and suggestions in support. Any party adversely affected may file, on or before the date fixed by the notice, counter-suggestions of not more than six pages, and shall serve a copy on the applicant or his attorney.

If the application be granted, the transcript on appeal filed in the Court of Appeals, together with any other papers filed in the Supreme Court, shall constitute the transcript on appeal in the Supreme Court, and no new transcript on appeal need be filed. Briefs filed in the Court of Appeals shall be filed in the Supreme Court, and no new briefs need be prepared, but parties may file additional briefs if they desire to do so.

A petition for certiorari on the ground of conflict of decision will be considered as an application to transfer and must comply with the requirements of this rule.

A Court of Appeals at any time within fifteen days after adopting an opinion, if no motion for rehearing or transfer is filed, or at any time during the pendency of such a motion, may on its own motion order a case transferred to the Supreme Court in accordance with Section 10 of Article V of the Constitution. The provisions of this rule relating to the transcript on appeal and briefs in the

Supreme Court shall, so far as possible, apply to cases so transferred.

Any case coming to the Supreme Court after having been briefed on the merits in, and decided by, a court of appeals will be finally determined by the Supreme Court the same as on original appeal, whether such case comes to it by certification, transfer or certiorari. For the purpose of filing additional briefs, if any, and for oral argument, the parties shall retain the same position as appellant and respondent as in the Court of Appeals. If additional briefs are filed, the time for service and filing thereof shall be governed by rule 1.09.

Rule 35.01, Rules of Criminal Procedure, Supreme Court of Missouri:
R. S. Mo. (1953 Supp.), p. 779.

Contempt, Criminal — Summary Punishment — Order — Other Contempt Proceedings—Notice — Bail — Disqualification of Judge—Order. (a) A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record. (b) A criminal contempt except as provided in subdivision (a) of this Rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the prosecuting attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to admission to bail as provided in

these Rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a finding of guilt the court shall enter an order reciting the essential facts constituting the criminal contempt and fixing the punishment.